United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7102

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

JOSEPHINE McGRAW, individually and on behalf of her minor dependent children and all persons similarly situated,

Plaintiff-Appellant,

-against-

STEPHEN BERGER, individually and as Commissioner of the New York State Department of Social Services,

JAMES DUMPSON, individually and as Commissioner of the New York City Department of Social Services, and

THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Defendants-Appellees.

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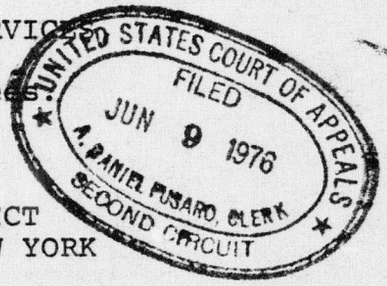

ON APPEAL FOR THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR STATE DEFENDANTS-APPELLEES

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Plaintiff-appellant ("plaintiff") appeals from an Order of the Hon. William C. Connor, United States District Judge, dated February 25, 1976. That Order granted summary judgment

in favor of defendants-appellees ("defendants") on plaintiff pendent claim against 18 New York Code Rules and Regulations § 352.31(d)(1)(ii) which provides for the recoupment of certain public assistant overpayments and denied motions for a preliminary injunction and class action order. R1-R21.*

Questions Presented

1. Does New York offend federal law by recouping agency caused overpayments of public assistance from recipients whose available income exceeds the state standard of need by reason of their earnings if those earnings must be disregarded in the initial determination of eligibility?

2. Did plaintiff's application for a class action order become moot upon the district court's grant of summary judgment in defendants' favor?

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* By order dated March 25, 1976, Circuit Judge William H. Timbers permitted plaintiff to dispense with the filing of an Appendix on condition that she file four (4) copies of the portions of the record upon which she relies on this appeal. References to those excerpts are prefixed with the letter "R" herein. The portions of the record filed by plaintiff omit substantially all of the papers filed by defendants below. Accordingly, the state defendants have filed four (4) copies of the portions of the record upon which they rely on this appeal which are not included in plaintiff's excerpts. References to the excerpts filed by the state defendants are prefixed by the letters "S.R."

3. If the class action application is not moot, did the district court err in finding that class action status was not required in this action which challenges the validity of a state social services regulation on its face?

State Regulation Involved

18 New York Codes Rules and Regulations § 352.31(d) states in part:

> Recoupment of overpayments.
>
> (1) Except as provided in paragraph (2) of this subdivision, recoupment of overpayments of assistance including overpayments resulting from assistance paid pending a hearing decision shall be treated as follows:
>
> (i) Recoupment shall be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.
>
> (ii) Recoupment of any overpayment made to a recipient shall not be required unless the recipient has currently available income or resources, exclusive of the current assistance payment. Exempted income and disregards shall be considered as being currently available.

(2) Where overpayments were occasioned or caused by a recipient's willful withholding of information concerning his income, resources, or other circumstances which may have affected the amount of the public assistance payment, recoupment of prior overpayments from current assistance grants shall be made irrespective of current income and resources. In such cases, recoupment shall not be limited to overpayments made during the 12 months preceding the month in which the overpayment was discovered.

* * *

(4) The proportion of the current assistance grant that may be deducted for recoupment purposes shall be limited on a case-by-case basis so as not to cause undue hardship, and in no case shall exceed 10 percent of household needs, and shall continue until such time as the excess payments have been recovered, except that where two or more recoupments are made simultaneously for different reasons or arising from different circumstances, the total reduction in the assistance grant shall not exceed 15 percent of the household's needs. In the event the amount required to be reduced hereby is greater than the amount of the current grant payments, such payments shall be withheld until the amount of the excess grants has been recouped.

Federal Statute Involved

42 U.S.C. § 602 states in part:

> (a) At state plan for aid and services to needy children must*** (7) except as may be otherwise provided in clause (8), provide that the State agency shall in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;
>
> (8) provide that, in making the determination under clause (7), the State agency - (A) shall with respect to any month disregard --
>
> * * *
>
> (ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month.****

Federal Regulation Involved

45 C.F.R. § 233.20 states in part:

> (a) Requirements for State Plans. A State Plan for . . . AFDC . . . must, as specified below:
>
> * * *
>
> (12) Recoupment of overpayments and correction of underpayments. Specify uniform statewide policies for:
>
> (i) Recoupment of overpayments of assistance, including certain overpayments resulting from assistance paid pending hearing decisions.
>
> (A) The State may not recoup any overpayment previously made to a recipient:
>
> (1) Unless the recipient has income or resources exclusive of the current assistance payment currently available in the amount by which the agency proposes to reduce payments: except that,
>
> (2) Where such overpayments were occasioned or caused by the recipient's willful withholding of information concerning his income, resources or other circumstances which may affect the amount of payment, the State may recoup prior overpayments from current assistance grants irrespective of current income or resources.
>
> * * *

(e) Any recoupment of overpayments made under circumstances other than those specified in (a)(12)(i)(B) of this section shall be limited to overpayments made during the 12 months preceding the month in which the overpayments was discovered.

(f) Any recoupment of overpayments permitted by paragraph (a)(12)(i)(A)(2) of this section may be made from availabile income and resources including disregarded, set-aside or reserved items) or from current assistance payments or from both. If recoupments are made from current assistance payments, the State shall, on a case-by-case basis, limit the proportion of such payments that may be deducted in each case, so as not to cause undue hardship or [on] recipients.

(g) The plan may provide for recoupment in all situations specified herein, or only in certain of the circumstances specified herein, and for waiver of the overpayment where the cost of collection would exceed the amount of the overpayment.

Statement of the Case

Facts

Plaintiff McGraw is an employed recipient of Aid to Families with Dependent Children ("AFDC"). R. 38. She receives aid for herself and her nine minor children and had worked for three years at the time of the commencement of the action in September 1975. Ibid.

Plaintiff's total bi-monthly AFDC needs are $343.00 as computed under the New York "standard of need." This total consists of a family allowance of $284.00 for basic needs* and a shelter allowance of $59.00** S.R. 2, 4.

*One-half of the monthly $568.00 basic needs grant provided for a family of 10. New York Social Services Law ("NYSSL") § 131-a(2).

**One-half of plaintiff's actual monthly rent. The New York 'standard of need' provides rent "as paid" up to maximums established for each local press services district by family size. Lavine v. Milne, ____ U.S. ____, 95 S. Ct. 1010, 1016 n. 12; Van Lare v. Hurley, 421 U.S. 338 (1975). The current New York City shelter maximum for a family of 10 is $314.00 per month. 18 NYCLR § 352.3(a).

Plaintiff earns $265.84 from her employment. Of this amount, $49.77 is deducted for work-related expenses under 42 U.S.C. § 602(a)(7) and $98.61 is "disregarded" under 42 U.S.C. § 602(a)(8)(ii).* S.R. 2, 5. The balance of plaintiff's earnings (net income), $117.46, is then offset against the standard of need (equivalent to $343.00 herein) to determine her AFDC eligibility. This comparison shows a bi-monthly budget deficit of $225.54, and plaintiff is per force AFDC eligible. Since New York currently pays assistance at 100% of the standard of need under NYSSL § 131-a(3), plaintiff would, in ordinary course, receive a bi-monthly grant equal to the amount of the deficit. S.R. 2-3. Under such circumstances plaintiff would have a aggregate bi-monthly income of $441.61 ($265.84 earnings minus $49.77 work-related expenses plus $225.54 AFDC) to meet her needs and those of her children. This amount is $98.61 more than $343.00 provided under the state standard of need, and $98.61 more than

*Section 602(a)(8)(ii) provides for a "$30 and one-third" earned income disregard in determining the need of AFDC applicants who are employed. The first $30 of income earned in any month must be disregarded plus one-third of the remainder. The amount of the disregard herein is thus $15 plus 1/3 of $250.84, or $98.61. S.R. 2, 5.

a non-working AFDC caretaker relative with the same size family and same rental cost could obtain. S.R. 3, 4.

In April 1975, the New York City Department of Social Services ("NYCDSS") advised plaintiff that it had made a bi-monthly error of $47.16 by under-budgeting her income during the preceding ten months with the result that NYCDSS had overpaid plaintiff the sum of $990.36. R. 31. Plaintiff was further advised that NYCDSS intended to recoup its loss.* Ibid.

*NYCDSS initially advised plaintiff that the recoupment would result in suspension of her AFDC grant for 13 periods because her "budget deficit" was less than her "exempted [disregarded] income." R. 31. This determination was later modified to conform with 18 NYCRR § 352.31(d)(4) which directs that recoupment avoid "undue hardship" and limits one recoupment to a maximum of 10% of household needs and two or more recoupments to a maximum of 15% of such needs. Compare Appellant's Brief p. 11. See discussion in Hagans v. Berger, ____ F. 2d ____ (Doc. No. 76-7101, 2d Cir. June 2, 1976) (reproduced at S.R. 65-79) at S.R. 74-75.

NYCDSS' finding of an erroneous overpayment and its determination to recoup were contested at a state Fair Hearing held at plaintiff's request and affirmed. R. 32. The Fair Hearing Decision held in part that plaintiff had income and resources, in the form of disregarded income, which exceeded her AFDC needs and that 18 NYCRR § 352.31(d) authorized the recoupment the $990.36 overpayment from that source. R. 32 - R. 33.*

Plaintiff's budget was recomputed to show the authorized recoupment and correct other errors following the Fair Hearing. S.R. 4-5. The amount of the recoupment is $34.30 bi-monthly, 10% of plaintiff's AFDC, or household, needs under 18 NYCRR § 352.31(d)(4). S.R. 3.

This amount is withheld from the bi-monthly $225.54 AFDC grant, reducing it to $191.24 (S.R. 3, 4) and has the same purpose and effect as reducing the income disregard by $34.30, from $98.61 to $64.31. As a result,

*Additional errors in plaintiff's budget came to light during the Fair Hearing. S.R. 2. They were not placed in issue in the action.

plaintiff's bi-monthly aggregate income during the period of recoupment is $407.31 (S.R. 3), $64.31 (rather than $98.61) more than the state standard of need provides for a family of 10.

The New York State Department of Social Services ("NYSDSS") estimates that there were 80,300 overpaid AFDC cases involving 280,00 persons during the period January 1 through June 30, 1975. Of these overpayments, approximately 42% were local agency caused and 58% were attributable to recipients. S.R. 6-7. The dollar impact of such agency caused errors was approximately $26.8 million for the six month period July 1 through December 31, 1974, or 4.3% of all AFDC expenditures.* S.R. 9. See also Hagans v. Berger, S.R. 79 n. 7.** While there is no data available with specific reference to overpayments in earned income cases, it is fair to conclude, given the generally high percentage of agency caused overpayments, that

*There were approximately 350,000 AFDC cases in the overall caseload. S.R. 6.

**The major sources of agency error are the failure to budget reported income and the incorrect budgeting of such income. S.R. 10.

the losses so occasioned in that segment of the caseload are substantial and would have serious consequence for the fiscal integrity of the AFDC program were the local agencies denied the power to recoup.

Proceedings and Opinion Below

The complaint challenges 18 N.Y.C.R.R. § 352.31(d)(1)(ii) insofar as it provides for the recoupment of agency caused overpayments of public assistance from recipients who have earned income disregards in addition to their assistance payments. R. 37.

The grounds of the challenge § 352.31(d)(1)(ii) is as follows: The state regulation opposes 42 U.S.C. § 602(a)(8)(ii) which mandates the use of "$30 and one-third" earned income disregard in computing AFDC eligibility under the applicable state standard of need (R. 48 - R. 49); the regulation inflicts a punishment "without fault" upon recipients who receive overpayments which denies them due process of law (R. 49); and the regulation establishes a class of recipients who work and whose income disregards are subject to recoupment without their fault and without "rational or permissible justification" in violation of those recipients' right to equal protection of the laws. R. 50.

Jurisdiction of the district court was alleged under 28 U.S.C. §§ 1331 and 1343(3), (4). R. 37. Declaratory and injunctive relief was sought (Ibid.), and a class action order requested. R. 38 - R. 40.*

The single district judge determined that plaintiff's due process and equal protection claims, "whatever their ultimate merits, are at the least arguable," and thus that subject matter jurisdiction vested under 28 U.S.C. § 1343(3). R. 3. He then proceeded to adjudicate plaintiff's potentially dispositive pendent claim of inconsistency between § 352.31(d)(1)(ii) and 42 U.S.C. 602(a)(8)(ii). Ibid. Hagans v. Lavine, 415 U.S. 528 (1974); Taylor v. Lavine, 497 F. 2d 208 (2d Cir. 1974), rev'd on other grounds sub nom. Van Lare v. Hurley, 421 U.S. 338 (1975). The facts were undisputed, and the

*Plaintiff defines the class as "all employed recipients of AFDC in New York State and their families who receive the benefit of earned income disregards pursuant to 42 U.S.C. § 602(a)(8), who have received AFDC overpayments not occasioned by their willful misrepresentation or withholding of information, and who are having all or part of their earned income disregards withheld by a local agency of the New York State Department of Social Services, to recoup the AFDC overpayment, under authority of 18 [N.Y.C.R.R.] § 352.31(d)(1)(ii)." R. 38. Emphasis original.

pendent claim was determined as if on motions for summary judgment. Ibid.

In ruling for defendants, the district judge recognized that in recouping overpayments from recipients with earned income disregards, the state and local social services agencies seek "no more than to retrieve monies received without entitlement... [from a] source that, by definition, lies beyond the minimum standard established as necessary for the AFDC recipient's subsistence[.]" R. 8. "Thus, even if reduced by an amount representing the full measure of the earned income disregard, such a grant would still raise the recipient to the level of his determined standard of need." R. 9 - R. 10.

42 U.S.C. § 602(a)(8)(ii), providing for the "$30 and one-third" earned income disregard, was distinguished from state recoupment practice on the ground that the former was concerned solely with the determination of eligibility, or needs, whereas recoupment assumed eligibility and was occasioned by the necessity of recapturing monies that had been paid in excess of need and in excess of the authorized disregard. To the extent that recoupment could be said to diminish assistance, if at all, since its purpose and effect is to provide overall grants which

correctly reflect need, it refers to the level of benefits provided, not to needs, an area in which states have been traditionally allowed broad discretion. R. 10. HEW approval of New York practice under § 602(a)(8)(ii) was also noted. R. 11-12. The district judge did not rely on any federal regulation as controlling the issue in defendant's favor.

Johnson v. Likens, No. 4-75 Civ. 318 (D. Mass. 1975) (reproduced at R. 54 - R. 100) was distinguished - on the grounds that the district court in that case had misunderstood HEW's position, that it misread § 602(a)(7) and (8) as setting the amount of assistance rather than providing the basis for determining need, and that it had afforded an overly broad interpretation to the history of § 602(a)(8) which generally supports income disregards as work incentive measures. R. 12 - 18.

The district judge reached the class action motion. Noting that Edelman v. Jordan, 415 U.S. 651 (1974) precluded him from awarding retroactive welfare benefits assuming they were otherwise appropriate, he declined to certify a class since such certification "would add no force to the prospective effects" of the declaratory and injunctive orders that were within his power. R. 4.

POINT I

RECOUPMENT OF PUBLIC ASSISTANCE OVERPAYMENTS FROM RECIPIENTS WHO HAVE EARNED INCOME DISREGARDS WHICH PROVIDE THEM WITH AVAILABLE INCOME IN EXCESS OF THE NEW YORK 'STANDARD OF NEED' DOES NOT OFFEND THE SOCIAL SECURITY ACT. SUCH RECOUPMENTS CONFORM WITH FEDERAL IMPLEMENTING REGULATIONS, AND HEW HAS SPECIFICALLY APPROVED NEW YORK PRACTICE UNDER 18 NYCRR § 352.31(d)(1)(ii).

Plaintiff argues that the Supremacy Clause bars New York from recouping agency caused overpayments from the "$30 and one-third" earned income disregard provided AFDC recipients under 42 U.S.C. § 602(a)(8)(ii) because the statute's use of the term "disregard" opposes the act of recoupment which perforce considers the amount of the disregard as available income. Appellant's Brief, pp. 13-29. The argument erroneously assumes that two important policies supportive of the AFDC provisions of the Social Security are mutually inconsistent. Those policies are first, the recapture erroneous overpayments from recipients whose available income exceeds the standard of need, and the second, the provision of a work incentive, in the form of earned income disregards.

The first policy is intended to insure that the limited fiscal resoueces provided for public assistance are equitably distributed by eliminating windfalls for those recipients who receive the overpayments and avoiding the risk of diminished benefits for all eligibles or no benefits for some eligibles. Hagans v. Berger, S.R. 73; Steere v. State of Minnesota, No. 285 (1975), Minnesota Supreme Court, May 21, 1976 (reproduced at S.R. 40-64) S.R. 60-61; Memorandum for the United States as Amicus Curiae v. Johnson v. Likens (hereinafter "HEW Memorandum") (reproduced at S.R. 19-36) S.R. 25-26. Opinion of the district court, R. 8. The second policy, as expressed in § 602(a)(8)(ii), is intended to reduce AFDC expenditures and to provide the welfare recipient with an incentive to work by allowing him to "keep" a portion of his earnings in excess of his needs. HEW Memorandum, S.R. 28-31; Opinion of the district court, R. 19 n. 3. By allowing recoupment from earned disregards pursuant to 18 NYCRR § 352.31(d)(1)(ii), New York serves both policies: the erroneous overpayments are redistributed and, by reason of the § 352.31 (d)(4) limitiations on the amount of recoupment (undue hardship and a maximum of 10% and 15% of needs for single and multiple recoupments, respectively), the recipient subject to a recoupment is permitted to retain a portion of his disregard (in addition to his full needs) as did plaintiff herein.

Facts, pp. 11-12.* No federal statutes oppose New York practice, and that practice conforms with the pertinent federal regulation, 45 C.F.R. § 233.20(a)(12)(i)(A)(1),** and has been specifically approved by HEW. S.R. 13. See also NYSDSS Administrative Letters 74 ADM-118, S.R. 14, and 75 ADM-46, S.R. 18. The single contrary decision is Johnson v. Likens, R.54-R. 100, which the district court properly declined to follow. R.12-R.17. The Johnson decision is also opposed in the HEW Memorandum submitted in that case following the decision, S.R. 19-34, and by the recent decision of the Minnesota Supreme Court in Steere v. State of Minnesota, S.R. 40-64. See especially pp. S.R. 57-60.

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* Even if the amount of the recoupment equalled the entire disregard, the recipient's work incentive would only be affected temporarily. HEW Memorandum, S.R. 29-30.

** HEW states that the "(A)" should be lower case. HEW Memorandum, S.R. 19 and Appendix A at S.R. 35. The upper case use is retained herein to provide consistency with the citations below.

Plaintiff's reliance on the use of the term disregard in 42 U.S.C. § 602(a)(8)(ii) as precluding the treatment of the disregarded income as available for recoupment purposes fails to consider the purpose of the disregard as expressed in the statute. That purpose appears from clause (a)(8)'s incorporation of clause (a)(7) which in turn refers to the determination of AFDC needs for eligibility purposes. Clause (a)(8) is silent with respect to any post-eligibility use of the disregarded income. Recoupment is necessarily such a use, and in defendant's view, plaintiff's central contention of inconsistency between State recoupment practice and § 602(a)(8)(ii) is simply answered by the fact that the federal statute does not reach the question plaintiff puts in issue.

Further extrapolation of plaintiff's argument on the statute to the effect that § 602(a)(8) really determines level of assistance rather than eligibility and/or that each recoupment constitutes a pro-tanto re-determination of need are refuted by the terms of the statute and the nature of recoupment as level as by recent decisions on point.

Notwithstanding the opinion Johnson v. Likens, R. 54-R 100, there is simply no basis for reading needs in clause (a)(7) as level of benefits or their functional equivalent. Clause (a)(7) makes no reference to level of benefits. As the district judge correctly observed: "The two [needs and level of benefits] are not ... functionally identical -- although, as is currently true in New York, they may prove to be equivalent in amount. The budget deficit represents the "basis" of the AFDC grant only to the extent that the latter may not exceed one hundred per cent of the former, although the State may compute the grant as a lesser percentage of the budget deficit. The AFDC grant is thus a function not only of the recipient's need, but also of the administrative imperatives that may be dictated by a State's limited fiscal resources." R. 14. Recoupment is one of those imperatives. The district judge also correctly recognized that levels of benefits, as distinguished from measurement of needs, are traditionally matter of state pre-rogative, not federal statutory mandate. District court R. 10 citing Jefferson v. Hackney, 406 U.S. 535 (1972); Dandridge v. Williams, 397 U.S. 471 (1970); Rosado v. Wyman, 397 U.S. 397, 413 (1970).

Perhaps, most importantly, recoupment does not affect a reduction in established benefit levels. It is by reason of an excess payment in benefits that recoupment becomes operational, and it is the purpose and effect of recoupment to re-establish the concededly correct benefit level, not to reduce below that level. See e.g. Hagans v. Berger, S.R. 69. The specific limitation on recoupment imposed in N.W.R.O. v. Weinberger, 377 F. Supp. 861 (D.D.C. 1974), to the effect that at no point in time should the recipient's benefit level fall below subsistence (regardless the fact that overall benefits are not reduced) is of course followed under 18 N.Y.C.R.R. § 351.32(d)(1) which allows for recoupment for agency caused errors only from the disregarded income, an amount necessarily above subsistence, or in addition to the standard of need.

As recoupment does not reduce benefits, it does not effect a re-determination of need. As noted above with respect to clauses (a)(7) and (a)(8), the determination of need is a completely separate process, and that determination remains constant throughout. Thus, when a recipient receives an overpayment, his needs have not changed and are not changed thereby. Equally, when he is obliged to pay back

that overpayment, the assessment of his needs is not affected. As the Minnesota Supreme Court observed in Steere (S.R. 60): "The recoupment process corrects prior overpayment, it does not determine need. The fact that the recoupment process takes care that recoupment not invade a family's basic grant level as established in the need-determination process does not mean that recoupment is a re-determination of need. It means, at most, that the recoupment process recognizes and utilizes need as already established by the former process."

Moreover, had Congress intended to preclude recoupment from earned income disregards, it is apparent from express statements with respect to recoupments from other forms of exempted income that it would have done so. See § 507 of the Higher Education Amendments of 1968 (grants or loans to students not available for recoupment); 7 U.S.C. § 2016(c) (value of food stamps in excess of amount charged not to be considered income for any purpose); 42 U.S.C. § 3045h (benefits under Nutrition for the Ederly Program not to be treated as income for any purpose). See generally HEW Memorandum, S.R. 32-34.

In light of these factors, the district court correctly rejected plaintiff's reliance in 602(a)(8)(ii) as unsound, stating (R. 17):

> "Common sense inexorably directs this Court to assume that Congress would not have settled on such result [precluding recoupment from earned disregards] without having engaged in at least some evidenced debate or without projecting that intent via clear statutory directive. In the absence of such markings of an extra-ordinary legislative will, common sense further compels this Court's conclusion that Congress did not intend Section [602](a)(8) to disallow the limited sacrifice of "$30 + 1/3" of earned income for the compelling sake of overpayment recoveries and a consequently fair apportionment of the limited AFDC funds." (Footnote omitted).

HEW has specifically approved New York practice under § 352.31(d)(1)(ii) (S.R. 13) as well as the practice of recoupment from earned disregards in general. Opinion of the district court, R.11 - R. 12. Although not noted below, HEW has codified its policy in implementing regulation 45 C.F.R. § 233.20(a)(12)(i)(A)(1). The regulation provides in terms that a "State may not recoup any [non-recipient caused] overpayment ... (1)[u]nless the recipient has income or resources exclusive of the current assistance payment currently available... ." The income

disregard provided by § 602(a)(8)(ii) is such "currently available" "income" and is "exclusive of," or in addition to, the current assistance payment. It is therefore available for recoupment under the terms of the regulation.* Further regulatory support is found in 45 C.F.R. § 233.20(a)(12)(f), cited below at R.11, which states that overpayments willfully caused by recipients may be recaptured from exempt income, including disregards, or from current assistance payments, or from both. Thus, the reader may conclude that non-willfully caused overpayments may be recaptured from a more restrictive list of sources. The regulations must be accepted as correct interpretations of the Social Security Act absent "compelling indications" that they are wrong, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). Opinion of the district court, R.11-R.12. No such "compelling indications" are offered by plaintiffs herein, and none could stand in light of the interpretation of § 602(a)(8)(ii) offered above.

* HEW has noted that the choice of regulatory language was "unfortunate." HEW Memorandum, S.R. 20 n. 3. However, a clarifying Memorandum was issued on July 11, 1974 which includes § 602(a)(8)(ii) disregards as "currently available" income within the meaning of the regulation. Appendix B to HEW Memorandum, S.R. 37-39.

Shea v. Vialpando, 416 U.S. 251 (1974) and X v. McCorkle, 333 F. Supp. 1109 (D.N.J. 197) aff'd per curiam as modified sub nom. Engelman v. Amos, 404 U.S. 23 (1971) are not opposed. In Shea, the state failed to consider "any work expenses reasonably attributable to earning" income as mandated by § 602(a)(7) and chose instead to adopt standardized expense allowance. In Engelman, the state did not disregard "$30 and one-third" of earned income in computing need as mandated by § 602(a)(8)(ii) but chose instead to impose an administrative ceiling on earned disregards which would only coincidentally equal the "$30 and one-third" disregard. In New York, the "$30 and one third disregard" is followed exactly in computing need. As noted, that computation is irrelevant to the determination that the disregarded amount is "currently available" "income" for recoupment purposes. See Steere v. Minnesota, S.R. 55-56.

Van Lare v. Hurley, supra; Lewis v. Martin, 397 U.S. 552 (1970) and King v. Smith, 392 U.S. 309 (1968) fully support defendants. In those cases, the states were precluded from offsetting "presumed" income against the standard of need. Herein, the recoupment from earned income disregards is made from funds that are in fact currently available.

POINT II

THE CLASS ACTION MOTION BECAME MOOT UPON THE DISTRICT COURT'S DISPOSITION OF THE OF THE PENDENT CLAIM IN DEFENDANT'S FAVOR. IF NOT MOOT, THE MOTION WAS NONE-THELESS PROPERLY DENIED SINCE INJUNCTIVE AND DECLARATORY RELIEF WERE NOT APPROPRIATE TO THE CLASS AS A WHOLE.

A.

Once the district court denied plaintiff's pendent claim, the class action motion became moot. At that point, the only potential for a class action order remaining in the action was with respect to the constitutional claims and was properly a matter for the three-judge court. Idlewild Bon-Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962).

B.

Assuming the class action motion was properly reached, the district court was correct in denying it on the merits. As the district judge recognized, retroactive welfare benefits were barred under Edelman v. Jordan, 415 U.S. 651 (1974) (R. 4). Notwithstanding plaintiff's comments to the contrary, the action was directed to the face of § 352.31(d)(1)(ii) insofar as the

regulation states that "disregards shall be considered as currently available." Accordingly, the declaratory or injunctive relief available to plaintiff would result in the pro-tanto invalidation of the regulation, and no class-wide relief was necessary or was appropriate. Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Commission, 354 F. Supp. 778 (D. Conn., 1973) aff'd in part, rev'd in part 482 F. 2d 1333 (2d Cir., 1974), after remand 497 F. 2d 1113, (2d Cir.) cert. den. _____ U.S. _____ 95 Sup. Ct. 1997 (1975); Bailey v. Patterson, 323 F. 2d 201 (5th Cir., 1963).

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Dated: New York, New York
June 7, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for State Defendant

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JUDITH GORDON
ROSALIND FINK
Assistant Attorneys General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

CONSTANCE TREZZA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Defendant herein. On the 7th day of June , 1976 , she served the annexed upon the following named person :

W. BERNARD RICHLAND, ESQ.
Corporation Counsel
Municipal Building
New York, New York

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Constance Trezza

Sworn to before me this
7th day of June , 1976

Assistant Attorney General
of the State of New York

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JUDITH GORDON, being duly sworn, deposes and says:

1. I am over 18 years of age, not a party to this action and reside at Two World Trade Center, County of New York, State of New York.

2. On the 7th day of June, 1976, I served the Memorandum of Law in the above entitled action on John C. Gray, Jr., Lloyd Constantine, of Counsel, by personally delivering to and leaving copies thereof with the said Attorneys for Plaintiff-Appellant at Brooklyn Legal Service Corp. B, located at 152 Court Street, County of Kings, State of New York.

JUDITH GORDON

Sworn to before me this
7th day of June, 1976

Assistant Attorney General
of the State of New York